Supreme Court, U.S.
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No. 92-1302

In The

Supreme Court of the United States

October Term, 1992

INTERNATIONAL RAW MATERIALS, LTD.,

Petitioner,

v.

STAUFFER CHEMICAL COMPANY, RHONE POULENC INC., TG SODA ASH, INC., GENERAL CHEMICAL PARTNERS, TENNECO MINERALS CO., FMC WYOMING CORP., KERR-MCGEE CHEMICAL CORP., and AMERICAN NATURAL SODA ASH CORP.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For Third Circuit

REPLY BRIEF FOR PETITIONER

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Petitioner International Raw Materials, Ltd., respectfully submits this Reply Brief for Petitioner in support of its Petition for a Writ of Certiorari.

I. Respondents Misstate the Critical Question Presented Under The Webb-Pomerene Act.

The second question presented in the petition relates to domination of a Webb-Pomerene association by subsidiaries of its foreign competitors. Because inclusion of a subsidiary of a foreign *competitor* within a Webb-Pomerene association is utterly inimical to the purpose of the Act as set forth in *United States v. Concentrated*

Phosphate Export Ass'n, 393 U.S. 199 (1968), a case which respondents do not so much as mention, respondents mischaracterize this case as involving solely "the question of foreign ownership of Webb-Pomerene members . . . ." (Reply Brief at 11.) Respondents, thus, ignore the distinction between membership of foreign *companies* in a Webb-Pomerene association, an issue which this case does not raise, and membership of foreign *competitors*, the issue raised herein. Membership of foreign *competitors* in a Webb-Pomerene association flies in the face of the statute's specific goal to help American producers to compete more effectively *against* foreign competitors, as stated in *Concentrated Phosphate*. Respondents are silent on this issue. They ignore the legislative history cited in the petition and the canvas of that history in *Concentrated Phosphate*, the only substantive decision of this Court construing the Webb-Pomerene Act.

Legislative purpose controls the scope of antitrust exemptions. *See, e.g., United Mine Workers v. Pennington*, 381 U.S. 657, 662 (1965) (limiting scope of labor exemption to exclude relationships antithetical to exemption's purpose). This Court's analysis of the legislative history in *Concentrated Phosphate* makes clear that the involvement of foreign *competitors* is antithetical to the legislative purpose.[1]

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[1] At a minimum, respondents dramatically overstate matters when they insist the statute clearly permits membership by foreign companies. Even the court below disagreed with this superficial assertion, holding that "neither the statute nor the legislative history specifically resolves the question of whether membership in a Webb-Pomerene Association is limited to American-owned firms. . . . " (A-12).

II. Respondents' Attempt to Distinguish Such Cases as *Case-Swayne* Is Without Merit.

Respondents concede that the Third Circuit's construction of the forfeiture doctrine as providing for limited forfeiture under the Webb-Pomerene exemption was unique and differed from its application under all other antitrust exemptions construed by this Court.

Respondents attempt to distinguish *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384, 394 (1967), as an interpretation of the agricultural cooperative exemption from the antitrust laws under the Capper-Volstead Act, rather than a construction of the Webb-Pomerene Act. But this Court has consistently applied the principle that an exempt entity forfeits its entire antitrust exemption by conspiring with a non-exempt party no matter what exemption is at issue. Indeed, *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 231-32 (1979), applied this rule to the McCarran-Ferguson exemption for the business of insurance by relying specifically upon cases construing the Capper-Volstead and labor union exemptions by citing *Case-Swayne; United States v. Borden*, 308 U.S. 188 (1939); *Ramsey v. Mine Workers*, 401 U.S. 302, 313 (1971); and *United Mine Workers v. Pennington*, 381 U.S. 657, 665-666 (1965). It was the broad application of the principle that led to the concurring opinions in *Case-Swayne*.[2]

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[2] Respondents' citations to various government injunctive proceedings against Webb-Pomerene associations, where the relief fashioned was less than forfeiture of the immunity, are inapposite because the government did not seek forfeiture of the immunity as a form of relief in those cases and the Act was not interposed as a defense to recovery of monetary damages as is the case here and in *Case Swayne* and *Royal Drug*.

Respondents' efforts to distinguish application of the rule of forfeiture of antitrust immunity under the Webb-Pomerene Act from its application by this Court to the agricultural, insurance, and labor exemptions underscore the propriety of granting the writ to define the scope of the doctrine under the Webb-Pomerene Act. Respondents' argument concedes the application of the doctrine by the courts below to be unique under the antitrust laws.

III. Having Forfeited Their Immunity, the Members of the Association Did Not Retain Any Immunity to Fix Prices For Terminalling Services.

The third question presented by the petition relates to petitioner's standing to challenge respondents' immunity when interposed as a defense to petitioner's antitrust claims. *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967), rejected the concept that entities could be a little bit exempt after immunity was forfeited. It rejected the concept urged by respondents that immunity could be lost as to one party and retained against another or lost at one level and retained at another. Respondents cite no case to the contrary.[3]

This case alleges price fixing of terminalling rates, a *per se* violation of the Sherman Act. Respondents argue

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[3] Respondents cite *United States v. Minnesota Mining & Mfg. Co.*, 92 F.Supp. 947 (D. Mass. 1950), a case which preceded *Case Swayne* by seventeen years. That case did not involve forfeiture of immunity. It was a government enforcement action. The portion cited involved the scope of injunctive relief. No party in that action sought forfeiture of immunity as part of the relief.

that their price fixing was immune under the Webb-Pomerene Act. Petitioner contends respondents forfeited that immunity because (a) the Webb-Pomerene association included the non-exempt subsidiaries of foreign competitors, or (b) the association actually conspired with non-exempt foreign competitors.

In either instance the entire immunity was forfeited. Respondents' argument that a Webb-Pomerene association may negotiate terminalling rates begs this question by presuming the immunity was not lost.

Respectfully submitted,

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